

FILED
COURT OF APPEALS
DIVISION II

2021 AUG 16 PM 1:15

STATE OF WASHINGTON

BY AP
DEPUTY

NO. 55861-1-II

WASHINGTON STATE COURT OF APPEALS DIVISION II

KURT KANAM,

Petitioner,

v.

CITY OF TUMWATER ET AL,

Respondents.

OPENING BRIEF

Kurt Kanam
2103 Harrison # 143
Olympia WA. 98502

ORIGINAL

P/M: 8/14/21

TABLE OF CONTENTS	PAGE
I. ASSIGNMENT OF ERRORS.....	1-2
II. STATEMENT OF THE CASE.....	2-8
A. Introduction.....	2-5
B. Procedural History.....	5-8
III. ARGUMENT AND AUTHORITIES.....	8-43
A. The trial court abused its discretion denying Kanam's Motion to Reconsider.....	8-14
B. The issue of Kanam having standing as a Thurston County taxpayer objecting to a Thurston County permit process adhering to a Thurston County comprehensive plan has been conceded.....	14-23
C. Tumwater et al conceded it failed to do a SEPA study on the environmental impacts of a perpetual dilapidated and abandoned property.....	23-24
D. Tumwater et al conceded that Tumwater Municipal Code 18.54.070 and Code 18.36 were unconstitutional.....	24-27
E. Tumwater et al conceded Municipal Code 18.56 and Tumwater Municipal Code 18.54.070 used in Tandem and Separately, Violated RCW 19.27.095(1) and the Vested Rights Doctrine Statute.....	27-30
F. Tumwater et al conceded they should be enjoined from spending public funds to enforce and defend the illegal ordinances.....	30-36
G. Tumwater et al conceded the ordinances were bad public policy.....	36-41
H. The trial court should have rescheduled the Motion for Declaratory Judgement after the Judicial assistant failed to notify Kanam by email or phone.....	41-43
IV. CONCLUSION.....	43

ORIGINAL

TABLE OF AUTHORITIES

WASHINGTON CASES	PAGE
Abbey Rd. Grp., LLC v. City of Bonney Lake, 167 Wn.2d 242, 250, 218 P.3d 180 (2009)	28
Calvary Bible Presbyterian Church of Seattle v. Board of Regents, 72 Wn.2d 912 (1968)	32
City of Federal Way v. King County, 62 Wn. App. 530, 534-535r815 P.2d 790, 793 (1991)	23
City of Tacoma v. O'Brien, 85 Wn.2d 266 (1975)	32
Farris v. Munro, 99 Wn.2d 326 (1983)	33
Fuqua v. Fuqua, 88 Wn.2d 100, 558 P.2d 801 (1977)	In Passim
Grant County Fire Prot. Dist. No.5 v. City of Moses Lake, 145 Wn.2d 702,731 (2002)	38
Heriot v. Smith, 35 Wn. App. 496, 502, 668 P.2d 589 (1983)	12, 16
Holaday v. Merceri, 49 Wn. App. 321, 324, 742 P.2d .127, review denied, 108 Wn.2d 1035 (1987)	11
Hull v. Hunt, 53 Wn.2d 125, 130, 331 P.2d 856 (1958)	26
In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997)	9
Kightlinger v. PUD No.1 of Clark Cy., 119 Wash. App. 501, 506 (II, 2003)	33

WASHINGTON CASES CONT	PAGE
Lindberg v. Kitsap Cty., 133 Wn.2d 729, 746, 948 P.2d 805, 813 (1997)	In Passim
Olsen v. Delmore, 48 Wn.2d 545,550 (1956)	38
Robinson v. City of Seattle, 102 Wash. App. 795 (2000)	33
Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010)	9
Seattle-First Nat'l Bank v. Shoreline Concrete Co., 91 Wn.2d 230, 240, 588 P.2d 1308 (1978)	In Passim
Smith v. Shannon, 100 Wn.2d 26, 37, 666 P .2d 351, 358 (1983)	In Passim
State v. Bilal, 77 Wn. App. 720, 722, 893 P.2d 674 (1995)	42
State v. Elmore, 139 Wn.2d 250, 276, 985 P.2d 289 (1999).....	42
State ex rei. Boyles v. Whatcom Cy. Sup. Ct., 103 Wn.2d 610 (1985)	33
State ex rel. Wash. Toll Bridge Auth. v. Yelle, 32 Wn.2d 13, 24-25, 200 P.2d 467 (1948)	37
State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007)	13
State v. Madry, 8 Wn. App. 61. 70, 504 P.2d 1156 (1972).....	42

WASHINGTON CASES CONT	PAGE
State v. Mason, 34 Wash. App. 514, 516- 517 (1983)	38
State v. Morgensen, 148 Wn. App. 81, 88, 197 P.3d 715 (2008).....	42
State v. Post, 118 Wn.2d 596, 618-19, 826 P.2d 172 (1992).....	42
State v. Stenson, 132 Wn.2d 668, 701, 940 P .2d 1239 (1997)	10
Town of Woodway v. Snohomish County, 180 Wn. 2d 165, 173, 322 P.3d 1219 (2014)	28
United Parcel Serv., Inc. v. Dep't of Revenue, 102 Wash.2d 355, 367, 687 P.2d 186 (1984)	38
Valley View Indus. Park v. City of Redmond, 107 Wn.2d 621, 637, 733 P.2d 182 (1987)	28
Walker v. Munro, 124 Wn.2d 402 (1994)	33
Weyerhaeuser v. Pierce County, 95 Wn. App. 883, 891, 976 P.2d 1279 (1999)	27-28
Wilcox v. Basehore, 187 Wn.2d 772, 389 P.3d 531 (2017)	In Passim

U.S. SUPREME COURT CASES	PAGE
---------------------------------	-------------

e.g., <i>Mo. Pac. Ry. v. Nebraska</i> , 164 U.S. 403, 416, 17 S. Ct. 130, 41 L. Ed. 489 (1896)	25
<i>Flast v. Cohen</i> , 392 U.S. 83, 106 (1968)	31
<i>Marbury v. Madison</i> , 5 U.S. 137 (1803)	25
<i>Nollan v. Cal. Coastal Comm'n</i> , 483 U.S. 825, 836-37, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987)	25
<i>Suitum v. Tahoe Reg. Planning Agency</i> , 520 U.S. 725, 736 n. 10 (1997)	31
<i>Yick Wo v. Hopkins</i> , 118 U.S. 356 (1886)	25

WASHINGTON CONSTITUTION

<i>Wash. Const. Art. I, § 2</i>,,,	34
<i>Wash. Const. Art. I, § 3</i>	34
<i>Wash. Const. Art. 1, § 11</i>	33, 34
<i>Wash. Const. Art. I, § 12</i>	34, 37
<i>Wash. Const. Art. I, § 22</i>	42

U.S. CONSTITUTION

<i>Amend. XIV § 1</i>	38, 42
<i>Amend. VI</i>	42

STATUTES	PAGE
RCW 19.27.095(1)	28
 RAP RULES	
RAP 2.5(a).....	11, 12
RAP 2.5(a)(3)	13

I. ASSIGNMENT OF ERRORS

1. Assignment of Errors.

- a. The Superior Court erred granting the Tumwater et al amended motion to dismiss.
- b. The Superior Court erred by not granting Kanam declaratory and injunctive relief and by not rescheduling the hearing after the JA refused to answer email communications.
- c. The Superior Court erred denying the motion to reconsider.

2. Issues Pertaining to Assignment of Errors.

- a. The trial court should have ruled the permit process was a Thurston County process, and, that Tumwater et al violated the permit and historic building process outlined in the City of Tumwater Thurston County Joint plan, and, that Kanam had standing because he was a Thurston County taxpayer, and, that Kanam did request action from the Washington State Attorney General's Office prior to filing suit.
- b. The motion for declaratory judgment was conceded when Tumwater et al failed to address the arguments that the City of Tumwater violated the City of Tumwater Thurston County Joint plan¹ and sought dismissal on only procedural grounds.²

¹ Tumwater et al did not address any arguments regarding the allegations they did not adhere to the City of Tumwater Thurston County Joint plan, until the response to the motion to reconsider. However, in that response Tumwater only argued Kanam was required to challenge the permit process through the GMA. Tumwater never disputed whether they agreed to a permit process or a requirement for historic buildings.

c. The trial court erred ruling Kanam sought taxpayer standing “solely upon the City of Tumwater's refusal to permit a particular use of a building”, when Kanam sought standing based upon Tumwater’s failure to adhere to a permit and historic building process outlined in the City of Tumwater Thurston County Joint Comprehensive plan.

d. The trial court erred ruling Tumwater was not required to conduct SEPA studies on the environmental impact altering historic uses for the Olympia Brewery District building at 240 Custer Way and letting it become a dilapidated health hazard.

e. The trial court erred ruling the Tumwater Municipal Code 18.54.070 and Tumwater Municipal Code 18.56 were not unconstitutional.

f. The trial court erred ruling in the motion to reconsider that Kanam did not seek action from the AG prior to filing suit was untenable, and not supported by the record.

II. STATEMENT OF THE CASE

A. Introduction.

This appeal is filed by Kurt Kanam who disputes the use of two City of Tumwater ordinances³ used in tandem in a Thurston County permitting process and historic use process.

² Tumwater et al argued Kanam was not a Tumwater taxpayer.

³ Tumwater Municipal Code 18.54.070 and 18.56.

Kanam requested the Thurston County Superior court declare that Tumwater Municipal Code 18.54.070 and Tumwater Municipal Code 18.56 were unconstitutional and statutorily invalid. Kanam specifically alleged:

1. The codes were bad public policy because Tumwater did not comply with the intent of the GMA, and,
2. The codes had substantial environmental impact and Tumwater did not comply with SEPA, and,
3. The codes are invidious unconstitutional ordinances that Tumwater is using for unconstitutional takings without due process, without equal protection, and over vested property rights, and,
4. The codes were in violation of Tumwater's joint comprehensive plan with Thurston County, and
5. It was an illegal expenditure of public funds to enforce and defend the codes.

The area regarding the permit dispute⁴ was within a 300 acre area clearly defined within the area of the Tumwater's joint comprehensive plan with Thurston County. This contention was undisputed at the bench trial. The evidence on the record clearly showed the Tumwater Olympia Brewery District and building at 240 Custer Way was within the boundaries of the Tumwater's joint comprehensive plan with Thurston County.

Kanam thus alleged it was a violation of a Thurston County joint comprehensive plan with Tumwater and that he was a Thurston County taxpayer. That allegation was also undisputed at the trial court.

The only ruling the trial court judge appeared to make was that Kanam never sought action from the Washington State Attorney General prior to filing suit. Kanam respectfully argues that ruling was untenable because it was not supported by the record. APPENDIX 1

⁴ 240 Custer Way Tumwater Washington 98501.

Kanam also argues other assignments of error that may have been decided by the trial court judge.

Kanam appeals the trial court rulings and seeks reversal and remand.

B. Procedural History.

On September 22, 2019, Kurt Kanam wrote a Letter to the City of Tumwater about purchasing the building located at 240 Custer Way, Tumwater Washington. CP 39

On October 1, 2019, the City of Tumwater Administrator responded back with a letter stating storage was not allowed at that cite pursuant to the Tumwater Comprehensive Plan, Tumwater Municipal Code 18.54.070 and Tumwater Municipal Code 18.56. CP 39-40

On September 1, 2020, Kanam sent a letter to the Washington State Attorney General's Office requesting action be taken by the State of Washington to sop an alleged illegal

use of public funds enforcing Tumwater Municipal Code 18.54.070 and Tumwater Municipal Code 18.56 . CP 43

On September 4, 2020, Jeff Even of the Washington State Attorney General's Office sent a letter back to Kanam denying Kanam's request to act against his alleged illegal expenditure of public funds. (Attachment motion to supplement the record and take judicial notice)

On December 4, 2020, Kanam filed suit against the Tumwater ordinance and the Mayor of Tumwater Peter Kmet. Kanam also filed for injunctive relief. CP 1-4, CP 5-36.

On January 19, 2021, Tumwater et al moved for dismissal on the procedural grounds that Kanam was not a City of Tumwater taxpayer. CP 73-78.

On March 15, 2021, Kanam amended the complaint. CP 114-120, CP 167-172.

On March 22, 2021, Tumwater et al amended the motion to dismiss. CP 174-179.

On April 5, 2021, Tumwater et al responded to the motion for declaratory judgement. CP 180-187.

On April 6, 2021, Kanam filed a response to the amended motion to dismiss. CP188-205.

On April 6, 2021, Tumwater et al filed a reply to Kanam's response to the Tumwater et al motion to dismiss. CP 206-210

On April 14, 2021, Kanam filed a reply. CP 215-225

On April 22, 2021, the trial court granted the motion to dismiss. CP 230-231

On April 27, 2021, Kanam filed a motion to reconsider and a declaration in support. CP 232-235, 264-266, CP 243-263.

On May 11, 2021, Tumwater et al filed a response. CP 283-287, CP 278-282.

On May 13, 2021, Kanam filed a reply and a declaration in support. CP 288-294.

On May 14, 2021, the trial court denied the motion to reconsider. CP 296-297.

On June 1, 2021, Kanam filed this timely appeal of the trial courts orders.

III. ARGUMENT AND AUTHORITIES

A. The trial court abused its discretion denying Kanam's Motion to Reconsider.

In the motion to reconsider⁵, Kanam argued he has asked the Washington State Attorney General to act against the illegal Tumwater ordinances used in the Thurston County comprehensive plan. Kanam also argued Tumwater et al conceded that fact by not answering the allegation. Kanam alleges the trial court abused its discretion when it denied the

⁵ CP 232-235 CP 264-266, CP 243-263.

motion.⁶ “Appellate courts use an abuse of discretion standard to review the grant or denial of a motion for reconsideration.”

Kanam respectfully argues the trial court abused its discretion and made rulings that are manifestly unreasonable and were based on untenable reasons and rests on untenable grounds, when it ruled Kanam had not sought action from the Washington State Attorney General’s Office prior to filing suit. Kanam produced a letter to the Washington State Attorney General requesting action prior to filing suit against Tumwater et al. That letter was undisputed by the defendants Tumwater et al and is now conceded fact. “A trial court abuses its discretion only if its decision is manifestly unreasonable or rests on untenable grounds or reasons.” *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). A trial court abuses its discretion when its decision “is manifestly unreasonable or based upon untenable grounds or reasons.” *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d

⁶ CP 231

583 (2010) (quoting *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)). A trial court abuses its discretion only if any of the following is true:

- (1) The decision is “manifestly unreasonable,” that is, it falls “outside the range of acceptable choices, given the facts and the applicable legal standard”;
- (2) The decision is “based on untenable grounds,” that is, “the factual findings are unsupported by the record”; or
- (3) The decision is “based on untenable reasons,” that is, it is “based on an incorrect standard or the facts do not meet the requirements of the correct standard.”

Kanam respectfully argues the trial court abused its discretion on the motion to reconsider, because the ruling meets all criteria above. In addition, Kanam argues that no reasonable person would have taken the view that, Kanam did not seek action by the Attorney General’s Office, when in fact he did.

Furthermore, the opposing party did not dispute Kanam’s argument that he did request action when Kanam submitted his letter seeking action from the AG in his motion to reconsider.

“An abuse of discretion exists only if no reasonable person would have taken the view adopted by the trial court.” *Holaday v. Merceri*, 49 Wn. App. 321, 324, 742 P.2d 127, review denied, 108 Wn.2d 1035 (1987).

Tumwater et al thus conceded the argument that Kanam sought action by the Attorney General’s Office prior to filing suit and cannot make arguments on appeal for the first time. “failure to raise an issue before the trial court generally precludes a party from raising it on appeal.” *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351, 358 (1983) (citing *Seattle-First Nat’l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 240, 588 P.2d 1308 (1978); RAP 2.5(a)). This applies to not only assignments of error, but also briefing of legal issues related to assignments of error. *Lindberg v. Kitsap Cty.*, 133 Wn.2d 729, 746, 948 P.2d 805, 813 (1997) (citing *Fuqua v. Fuqua*, 88 Wn.2d 100, 558 P.2d 801 (1977) (refusing to consider multiple citations and legal arguments raised for the first time on

appeal)); see e.g. *Wilcox v. Basehore*, 187 Wn.2d 772, 389 P.3d 531 (2017) (“The issue of contractual indemnification as a challenge to the borrowed servant doctrine was not subject to review because the trial court was inadequately apprised of the points of law in a dispute relating to an indemnification provision.”).

Therefore, it is an undisputed fact that Kanam requested action from the Attorney General’s Office prior to filing suit. An undisputed fact is "a fact disclosed in the record or pleadings that the party against whom the fact is to operate either has admitted or has conceded to be undisputed." *Heriot v. Smith*, 35 Wn. App. 496, 502, 668 P.2d 589 (1983).

Now, Tumwater et al must make rebuttal arguments for the first time on appeal. However, the Court of Appeals for division II is not a court of first review. Generally, we do not address issues that a party did not raise in the trial court. RAP 2.5(a). One exception to the rule concerns manifest errors that affect a

constitutional right. RAP 2.5(a)(3) *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

The Washington Supreme Court, and the Rules of Appellate Procedure, provide that the “failure to raise an issue before the trial court generally precludes a party from raising it on appeal.” *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351, 358 (1983) (citing *Seattle-First Nat’l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 240, 588 P.2d 1308 (1978); RAP 2.5(a)). This applies to not only assignments of error, but also briefing of legal issues related to assignments of error. *Lindberg v. Kitsap Cty.*, 133 Wn.2d 729, 746, 948 P.2d 805, 813 (1997) (citing *Fuqua v. Fuqua*, 88 Wn.2d 100, 558 P.2d 801 (1977) (refusing to consider multiple citations and legal arguments raised for the first time on appeal)); see e.g. *Wilcox v. Basehore*, 187 Wn.2d 772, 389 P.3d 531 (2017) (“The issue of contractual indemnification as a challenge to the borrowed servant doctrine was not subject to review because the trial

court was inadequately apprised of the points of law in a dispute relating to an indemnification provision.”).

Consistent with precedent, this Court should refuse to consider new arguments by defendants regarding Kanam’s letter to the Washington State Attorney General for action against an illegal expenditure of public funds.

Therefore, with Kanam having made a request for action by the Washington State Attorney General prior to filing suit,⁷ and that argument conceded, Kanam respectfully argues he has standing to file a taxpayer lawsuit against Tumwater Municipal Code 18.54.070 and Code 18.56 as applied to a Thurston County process. The trial courts order to the contrary should be reversed and remanded.

B. The issue of Kanam having standing as a Thurston County tax payer objecting to a Thurston County permit process adhering to a Thurston County comprehensive plan has been conceded.

⁷ The Washington State Attorney General denied the request on

The defendants primary defense was that Kanam did not have standing as a City of Tumwater taxpayer. While Kanam did argue he paid Tumwater taxes, Kanam also argued that the permit and historic building process in dispute was a Thurston County process outlined in a joint comprehensive agreement between Tumwater and Thurston County and was therefore a Thurston County process.⁸ Kanam thus argued he only need be a Thurston County taxpayer to have standing to file suit.

The trial court judges written order did not detail a decision on whether Kanam was a Thurston County taxpayer and had standing to file suit. APPENDIX 2

Tumwater et al did not address this argument and conceded that the permit and historic building process in dispute was a Thurston County process outlined in a joint comprehensive agreement between Tumwater and Thurston County and was therefore a Thurston County process. It is therefore an

⁸ CP 79-110, CP 291-294

undisputed fact that the permit and historic building process Kanam went through was a Thurston County process and that Kanam had standing as a Thurston County taxpayer to file suit. An undisputed fact is "a fact disclosed in the record or pleadings that the party against whom the fact is to operate either has admitted or has conceded to be undisputed." *Heriot v. Smith*, 35 Wn. App. 496, 502, 668 P.2d 589 (1983).

The Judges written order appeared to only rule that Kanam did not seek action by the AG prior to filing suit.⁹ That could only mean that the trial court thought the permit and historic building process was a Thurston County permit process and that Kanam had standing as a Thurston County taxpayer to file suit he just had to request action from the Washington State Attorney General to do so.

In the alternative, if the Court of Appeals does not consider this to be the case, Kanam assigns error to the trial court ruling

⁹ CP 231

that Kanam was required to be a Tumwater taxpayer to file suit. Accordingly, Kanam argues that the permit and historic building process in dispute was a Thurston County process outlined in a joint comprehensive agreement between Tumwater and Thurston County and was therefore a Thurston County process. Kanam also argues this was an undisputed fact at the trial court that the permit and historic building process was a Thurston County process as shown below and on CP 262.

GOAL# 1

Ensure that the Joint Plan Land Use Element is implementable and coordinated with all applicable City of Tumwater and Thurston County plans and regulations and the plans of other jurisdictions in the Thurston region.

As shown above, this language clearly explains that all applicable City of Tumwater and Thurston County plans and **regulations**, including Tumwater Municipal Code 18.54.070 and Code 18.56, must be “implementable” and “coordinated” with other plans in the Thurston region. This plan being “implementable” and “coordinated” is the City of Tumwater

and Thurston County joint plan which Mayor Peter Kmet signed.

This language could only mean that the process was a Thurston County regional process and not “solely” a Tumwater process. The trial court erred making the determination that this was a City of Tumwater permit and historic building process when the evidence on the record clearly shows the Olympia brewery district was within the boundaries indicated on the map in the City of Tumwater and Thurston County joint plan,¹⁰ making this a Thurston County process not a Tumwater process.

Therefore, with Tumwater agreeing to a Thurston County permit and historic building process, Kanam had standing as a Thurston County taxpayer to file suit. Once Tumwater signed the City of Tumwater and Thurston County joint plan, Tumwater Municipal Code 18.54.070, and Code 18.56, as used

¹⁰ CP 64, CP 100, CP 250. CP 64 clearly shows the Custer Way property is within the boundaries of the City of Tumwater and Thurston County joint plan.

on 240 Custer Way, was a Thurston County permit and historic building process not a City of Tumwater process. This process is clearly written in the City of Tumwater and Thurston County joint plan. CP 68, CP 70.

With Tumwater having not complied with the permit process outlined on CP 68, and historic building process CP 70, Kanam was within his rights as a Thurston County taxpayer to challenge the permit and historic process on 240 Custer Way.

The City of Tumwater and Thurston County joint plan stated:

7. Permits. Application for both State and local government permits should be processed in a timely and fair manner to ensure predictability.

The Joint Plan includes a policy to ensure timely and fair processing of development permits (Goal #2, Policy 2.6). CP 68

However, the City of Tumwater told Kanam he could appeal to the City¹¹ but also told him he would lose the appeal.

¹¹ Tumwater et al argues Kanam should have sought relief under the GMA, however in their letter to Kanam in 2019, (CP 39-40) they said

This is not a fair process. Tumwater et al could not even begin to explain the fairness of a process that would require an undisclosed amount of money to enter a Tumwater controlled appeal process the city administrator already indicated he would lose. The biggest reason Tumwater et al never responded to this argument is because they knew their permit process was not fair. They knew it was never intended to be fair and was intended to create residential, retail, and mixed use out of a historic building that was only used for storage. To accomplish that goal Tumwater created an unfair process that, until Kanam's motion to reconsider, had no other means of resolution other than a Tumwater process which was already pre-determined despite the language of the City of Tumwater and Thurston County joint plan.

The City of Tumwater and Thurston County joint plan also stated:

Kanam had to appeal a Tumwater process that he would ultimately lose paying a fee that was not disclosed prior to starting the process.

13. Historic preservation. Identify and encourage the preservation of lands, sites, and structures that have historical or archaeological significance.

The City of Tumwater and Thurston County have historic preservation programs which provide processes for designation of local historic sites for protection. Similar programs are conducted at the State and national levels. The Joint Plan land use element contains goals and policies encouraging consistency with and support for these programs. (Goal #12, Policies 12.1 & 12.2) CP 71.

First, the 300-acre Olympia Brewery site is an historic site and structure. Second, the property at 240 Custer Way falls under the ambit of subsection 13 of the City of Tumwater and Thurston County joint plan. Here, Tumwater et al declared to Kanam they desired housing, retail, and craft beverage use¹² at the Historic site, which could only mean they never intended to “preserve” the building at 240 Custer Way. That building was historically used as a storage facility which was Kanam’s intended use. To get housing, retail and craft beverage use, the building would most likely have to be torn down and rebuilt. Or the building would need such renovation that the original

¹² CP 41

historic value of the structure would be lost. This would not “preserve” this historic structure as subsection 13 of the City of Tumwater and Thurston County joint plan intended. Indeed, this was a property takeover ordinance orchestrated by Tumwater et al and it was repugnant to the terms and conditions of the City of Tumwater and Thurston County joint plan. It was also repugnant to the permit process Kanam went through in his efforts to purchase and use the property at 240 Custer Way.

APPENDIX 3

Tumwater et al did not make any arguments at the trial court about the compliance with subsections 7 and 13 of the City of Tumwater and Thurston County joint plan. The Washington Supreme Court, and the Rules of Appellate Procedure, provide that the “failure to raise an issue before the trial court generally precludes a party from raising it on appeal.” *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351, 358 (1983) (citing *Seattle-First Nat’l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 240,

588 P.2d 1308 (1978); RAP 2.5(a)). This applies to not only assignments of error, but also briefing of legal issues related to assignments of error. *Lindberg v. Kitsap Cty.*, 133 Wn.2d 729, 746, 948 P.2d 805, 813 (1997) (citing *Fuqua v. Fuqua*, 88 Wn.2d 100, 558 P.2d 801 (1977) (refusing to consider multiple citations and legal arguments raised for the first time on appeal)); see e.g. *Wilcox v. Basehore*, 187 Wn.2d 772, 389 P.3d 531 (2017)

C. Tumwater et al conceded it failed to do a SEPA study on the environmental impacts of a perpetual dilapidated and abandoned property.

Kanam argued that the City of Tumwater failed to do an EIS on Tumwater Municipal Code 18.54.070, and Code 18.56. Kanam specified that an inadequate EIS enabled the trial court to invalidate the ordinances. Kanam wrote:

Kanam challenges the enactment of the planned action ordinance, and not its administration, such as specific project approvals issued through its application, declaratory relief is available and appropriate. *City of Federal Way v. King County*, 62 Wn. App. 530, 534-535r815 P.2d 790, 793 (1991)("A

declaratory judgment is used to determine questions of construction or validity of a statute or ordinance. CP 27

Tumwater et al remained silent on those arguments and relied solely upon a procedural argument that Kanam was not a City of Tumwater taxpayer. In doing so Tumwater et al conceded Kanam's SEPA arguments. The Washington Supreme Court, and the Rules of Appellate Procedure, provide that the "failure to raise an issue before the trial court generally precludes a party from raising it on appeal." *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351, 358 (1983) (citing *Seattle-First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 240, 588 P.2d 1308 (1978); RAP 2.5(a)). This applies to not only assignments of error, but also briefing of legal issues related to assignments of error. *Lindberg v. Kitsap Cty.*, 133 Wn.2d 729, 746, 948 P.2d 805, 813 (1997) (citing *Fuqua v. Fuqua*, 88 Wn.2d 100, 558 P.2d 801 (1977) (refusing to consider multiple citations and legal arguments raised for the first time on appeal)); see e.g. *Wilcox v. Basehore*, 187 Wn.2d 772, 389 P.3d 531 (2017).

D. Tumwater et al conceded that Tumwater Municipal Code 18.54.070, and Code 18.36 were unconstitutional.

Kanam argued Tumwater Municipal Code 18.56 and Tumwater Municipal Code 18.54.070 are unconstitutional and invalid, because they are part of an unconstitutional taking under article I, section 16. (See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) According to the Court, even if the law is impartial on its face, "if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." (See *Marbury v. Madison*, 5 U.S. 137 (1803).

Kanam also argued: A Law repugnant to the Constitution is void," The underlying rationale of this principle is where the governmental action attempts to impose an affirmative duty on unique private shoulders to foster a public benefit absent a legitimate exercise of the eminent domain power, the attempted

taking is appropriately enjoined at the outset rather than allowed to proceed subject to compensation. See, e.g., *Mo. Pac. Ry. v. Nebraska*, 164 U.S. 403, 416, 17 S. Ct. 130, 41 L. Ed. 489 (1896) (court invalidates uncommon stated taking of property for lack of justifying public purpose); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 836~37, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987) (unconstitutional taking of property results from illegitimate exaction)

Tumwater et al remained silent on those arguments and relied solely upon a procedural argument that Kanam was not a City of Tumwater taxpayer. In doing so Tumwater et al concede Kanam's arguments. The Washington Supreme Court, and the Rules of Appellate Procedure, provide that the "failure to raise an issue before the trial court generally precludes a party from raising it on appeal." *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351, 358 (1983) (citing *Seattle-First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 240, 588 P.2d 1308 (1978); RAP 2.5(a)). This applies to not only assignments of

error, but also briefing of legal issues related to assignments of error. *Lindberg v. Kitsap Cty.*, 133 Wn.2d 729, 746, 948 P.2d 805, 813 (1997) (citing *Fuqua v. Fuqua*, 88 Wn.2d 100, 558 P.2d 801 (1977) (refusing to consider multiple citations and legal arguments raised for the first time on appeal)); see e.g. *Wilcox v. Basehore*, 187 Wn.2d 772, 389 P.3d 531 (2017).

E. Tumwater et al conceded Municipal Code 18.56 and Tumwater Municipal Code 18.54.070 used in Tandem and Separately, Violated RCW 19.27.095(1) and the Vested Rights Doctrine Statute.

Kanam argued "Washington's vested rights doctrine, as it was originally judicially recognized, entitles developers to have a land development proposal processed under the regulations in effect at the time a complete building permit application is filed, regardless of subsequent changes in zoning or other land use regulations." *Abbey Rd. Grp., LLC v. City of Bonney Lake*, 167 Wn.2d 242, 250, 218 P.3d 180 (2009) (citing *Hull v. Hunt*, 53 Wn.2d 125, 130, 331 P.2d 856 (1958)). "Vesting 'fixes' the rules that will govern the

land development regardless of later changes in zoning or other land use regulations.” *Weyerhaeuser v. Pierce County*, 95 Wn. App. 883, 891, 976 P.2d 1279 (1999). Washington's rule is the minority rule, and it offers more protection of development rights than the rule generally applied in other jurisdictions. The majority rule provides that development is not immune from subsequently adopted regulations until a building permit has been obtained and substantial development has occurred in reliance on the permit. Our cases rejected this reliance-based rule, instead embracing a vesting principle that places greater emphasis on certainty and predictability in land use regulations. By promoting a date certain vesting point, our doctrine ensures that “new land-use ordinances do not unduly oppress development rights, thereby denying a property owner's right to due process under the law.” *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 637, 733 P.2d 182 (1987). Our vested rights cases thus recognize a “date certain” standard

that satisfies due process requirements. *Abbey Rd. Grp.*, 167 Wn.2d at 250- 51. Washington's vested rights doctrine originated at common law but is now statutory. *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 173, 322 P.3d 1219 (2014). Under RCW 19.27.095(1), vesting occurs on the filing of a “valid and fully complete building permit application.” In such an event, the “zoning or other land use control ordinances in effect on the date of the application” shall control. Kanam argued he had rights as a developer under the vested rights doctrine and Tumwater et al conceded that argument by not addressing it.

Kanam also argued he was not given a policy manual to determine what the fee would be for the process. Kanam also alleged this created a “mysterious fee” which would be unfair.

Tumwater et al remained silent on those arguments and relied solely upon a procedural argument that Kanam was not a City of Tumwater taxpayer. In doing so Tumwater et al

conceded Kanam's arguments that Tumwater Municipal Code 18.54.070, and Code 18.36 violated the vested rights doctrine. The Washington Supreme Court, and the Rules of Appellate Procedure, provide that the "failure to raise an issue before the trial court generally precludes a party from raising it on appeal." *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351, 358 (1983) (citing *Seattle-First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 240, 588 P.2d 1308 (1978); RAP 2.5(a)). This applies to not only assignments of error, but also briefing of legal issues related to assignments of error. *Lindberg v. Kitsap Cty.*, 133 Wn.2d 729, 746, 948 P.2d 805, 813 (1997) (citing *Fuqua v. Fuqua*, 88 Wn.2d 100, 558 P.2d 801 (1977) (refusing to consider multiple citations and legal arguments raised for the first time on appeal)); see e.g. *Wilcox v. Basehore*, 187 Wn.2d 772, 389 P.3d 531 (2017).

F. Tumwater et al conceded they should be enjoined from spending public funds to enforce and defend the illegal ordinances.

Kanam argued Tumwater should not be allowed to use public funds to enforce or defend Tumwater Municipal Code 18.54.070 Tumwater Municipal Code 18.56. Kanam argued the ordinances have been used against him and were ripe for dispute. Kanam argued the Supreme Court has acknowledged that taxpayer actions challenging the expenditure of taxes for unconstitutional purposes are traditional examples of ripe disputes. *Flast v. Cohen*, 392 U.S. 83, 106 (1968) (evaluating First Amendment federal taxpayer claim). Kanam also argued facial challenges to regulations are normally ripe the moment challenged. *Suitum v. Tahoe Reg. Planning Agency*, 520 U.S. 725, 736 n. 10 (1997). And the trial court in that case agreed, having denied Defendants' request to deem the challenge unripe. Washington has acknowledged taxpayer standing in two regards: (Category 1): when challenging government acts that are illegal or invalid; and (Category 2): when challenging otherwise legal and valid government acts. Category I requires no direct, special, or pecuniary interest in the outcome of the

action. Washington State has acknowledged taxpayer standing in two regards: (Category 1): when challenging government acts that are illegal or invalid; and (Category 2): when challenging otherwise legal and valid government acts. Category I requires no direct, special, or pecuniary interest in the outcome of the action. Kanam has a pecuniary interest, but in the event the court disagrees none is required. The subtext to the distinction, apparently, is that the government has no discretion to engage in illegal or unconstitutional conduct.

Kanam also argued he could assert Category 1 standing to facially challenge otherwise illegal government activity: *Calvary Bible Presbyterian Church of Seattle v. Board of Regents*, 72 Wn.2d 912 (1968) (finding Category 1 taxpayer standing to challenge tax-supported university teaching course dealing with historical, biographical, narrative or literary features of the Bible in violation of the First Amendment and Wash. Const. art. 1, § 11); *City of Tacoma v. O'Brien*, 85 Wn.2d 266 (1975) (finding Category 1 taxpayer standing to facially challenge

Laws of 1974, 1 st Ex. Sess., ch. 194, and then declaring is unconstitutional for violating separation of powers); *Kightlinger v. PUD No.1 of Clark Cy.*, 119 Wash. App. 501, 506 (II, 2003) (finding Category 1 taxpayer standing to challenge PUD's appliance repair business on basis that activity was illegal and lacked statutory authorization); *Robinson v. City of Seattle*, 102 Wash. App. 795 (2000) (finding Category 1 taxpayer standing to challenge constitutionality of Ord. 119278); *State ex rei. Boyles v. Whatcom Cy. Sup. Ct.*, 103 Wn.2d 610 (1985) (finding Category 1 taxpayer standing to challenge county jail's work release program for violating First Amendment and Wash. Const. art. 1, § 11); *Farris v. Munro*, 99 Wn.2d 326 (1983)(en banc) (finding Category 1 taxpayer standing to facially declare State Lottery Act unconstitutional exists provided Attorney General declines petitioner's solicitation to cure), *Walker v. Munro*, 124 Wn.2d 402 (1994) (finding that Category 1 taxpayer standing exists to challenge initiative that has gone into effect).

Kanam also argued the State is restrained by the 14th Amendment from "making or enforcing any law" that violates the Privileges & Immunities Clause. Moreover, the State shall not violate the Due Process and Equal Protection Clauses. Enacting and enforcing laws that do precisely this injury are expressly rendered illegal. The Washington Constitution defers to the supremacy of the Federal Constitution. Wash.Const. Art. I, § 2. It then adds further express prohibitions that "no law shall be passed" granting special privileges and immunities. Wash. Const. Art. I, § 12. As with the Federal Constitution, Washington forbids deprivation of life, liberty, or property without due process of law and prevents the legislature from "excusing acts of licentiousness or justifying practices inconsistent with the peace and safety of the state." Wash. Const. Art. I, §§ 3, 11. Further, the Washington Constitution echoes the First Amendment's prohibition that "Congress shall make no law" establishing religion/ but adds that "[n]o public money or property. Kanam asked the Washington State

Attorney General to take action on these illegal ordinances, yet they refused.

Tumwater et al remained silent on all those arguments and relied solely upon a procedural argument that Kanam was not a City of Tumwater taxpayer. In doing so Tumwater et al conceded Kanam's arguments that defending and enforcing Tumwater Municipal Code 18.54.070, and Code 18.36 is an illegal expenditure of public funds. The Washington Supreme Court, and the Rules of Appellate Procedure, provide that the "failure to raise an issue before the trial court generally precludes a party from raising it on appeal." *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351, 358 (1983) (citing *Seattle-First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 240, 588 P.2d 1308 (1978); RAP 2.5(a)). This applies to not only assignments of error, but also briefing of legal issues related to assignments of error. *Lindberg v. Kitsap Cty.*, 133 Wn.2d 729, 746, 948 P.2d 805, 813 (1997) (citing *Fuqua v. Fuqua*, 88 Wn.2d 100, 558 P.2d 801 (1977) (refusing to consider multiple

citations and legal arguments raised for the first time on appeal)); see e.g. *Wilcox v. Basehore*, 187 Wn.2d 772, 389 P.3d 531 (2017).

With Tumwater et al making only procedural arguments that Kanam was not a City of Tumwater taxpayer, Tumwater is now in the position of asking the Court of Appeals for Division II to be a court of first review on all the other issues Kanam argued to the trial court that did not involve whether Kanam was required to be a Tumwater taxpayer or whether Kanam asked the Washington State Attorney General to take action prior to filing suit. The Court of Appeals should limit its review to whether Kanam was entitled to a Thurston County permit and historic building process because the city of Tumwater signed the City of Tumwater and Thurston County Joint comprehensive plan.

G. Tumwater et al conceded the ordinances were bad public policy.

Kanam argued the Tumwater Municipal Code 18.54.070 and Tumwater Municipal Code 18.56 are unconstitutional taking mechanisms and are not what is best for public policy in

Thurston County or the City of Tumwater. Kanam also argued the court had inherent authority to consider what is best for “public policy” when determining whether an ordinance is constitutional. Kanam also argued, “It is not the province of the courts to declare laws passed in violation of the constitution valid, based upon considerations of public policy.” See *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 32 Wn.2d 13, 24–25, 200 P.2d 467 (1948). Kanam argued Tumwater Municipal Code 18.54.070 and Tumwater Municipal Code 18.56 created a 300 acre constitutional free zone, where the City of Tumwater can be free to violate State law, the State and United States Constitution, as the City of Tumwater explored new and innovative way to violate constitutional rights as it condemns property use without due process or compensation. Kanam also argued This difference for the 300 acres at the Olympia Brewery site and the rest of Tumwater Washington, violates article I, section 12.

Kanam also argued a legislative classification will not violate article I, section 12 if the legislation applies alike to all persons within a designated class and there is a reasonable ground for distinguishing between those who fall within the class and those who do not. *Grant County Fire Prot. Dist. No.5 v. City of Moses Lake*, 145 Wn.2d 702,731 (2002) (citing *United Parcel Serv., Inc. v. Dep't of Revenue*, 102 Wash.2d 355, 367, 687 P.2d 186 (1984)). Kanam also argued, it is settled law that a statute prescribing different punishments or different degrees of punishment for the same act under the same circumstances by persons in like situations violates both the privileges and immunities clause of the state constitution and the federal constitution's equal protection clause in Amend. XIV § 1. *Olsen v. Delmore*, 48 Wn.2d 545,550 (1956); *State v. Mason*, 34 Wash. App. 514, 516- 517 (1983) (accord).

Kanam also argued Tumwater sabotaged the only legitimate chance the city had to reduce the lane miles a substantial amount of food and goods must travel and did not calculate the

extra lane miles food and products must travel once they are evicted locally. Kanam argued the laws in the GMA are being violated not complied with as purported by the Tumwater Thurston County Joint comprehensive plan., because they have not consolidated economic activity, they have expanded it.

Kanam also argued that the City of Tumwater is using an unconstitutional ordinance, to continue a failed policy that makes matters worse under the GMA, under the guise of making things better. Tumwater Municipal Code 18.54.070 and Tumwater Municipal Code 18.56 are unconstitutional taking mechanisms and are not what is best for public policy in Thurston County.

Tumwater et al remained silent on all those arguments and relied solely upon a procedural argument that Kanam was not a City of Tumwater taxpayer. In doing so Tumwater et al conceded Kanam's arguments Tumwater Municipal Code 18.54.070 and Tumwater Municipal Code 18.56 are bad public

policy. The Washington Supreme Court, and the Rules of Appellate Procedure, provide that the “failure to raise an issue before the trial court generally precludes a party from raising it on appeal.” *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351, 358 (1983) (citing *Seattle-First Nat’l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 240, 588 P.2d 1308 (1978); RAP 2.5(a)). This applies to not only assignments of error, but also briefing of legal issues related to assignments of error. *Lindberg v. Kitsap Cty.*, 133 Wn.2d 729, 746, 948 P.2d 805, 813 (1997) (citing *Fuqua v. Fuqua*, 88 Wn.2d 100, 558 P.2d 801 (1977) (refusing to consider multiple citations and legal arguments raised for the first time on appeal)); see e.g. *Wilcox v. Basehore*, 187 Wn.2d 772, 389 P.3d 531 (2017).

With Tumwater et al making only procedural arguments that Kanam was not a City of Tumwater taxpayer, Tumwater is now in the position of asking the Court of Appeals for Division II to be a court of first review on all the other issues Kanam argued to the trial court that did not involve whether Kanam

was required to be a Tumwater taxpayer or whether Kanam asked the Washington State Attorney General to take action prior to filing suit.

H. The trial court should have rescheduled the Motion for Declaratory Judgement after the Judicial assistant failed to notify Kanam by email or phone.

It should have been obvious to the trial court that the snail mail was not providing adequate time for Kanam to become notified of hearing information. Rather than send immediate email communications, or even use telephone messages, the trial court stuck with what was obviously not working to the advantage of Tumwater and the disadvantage of Kanam. There was no legitimate reason not to respond to emails or communicate by email once it was clear regular mail was not providing adequate notice times. All the declarations of mailing in the would do not justify being stubborn about communications with litigants. Especially in the covid era.

The motion was not abandoned by Kanam, adequate notice was the issue and the trial court refused to correct a correctable

problem simply by sending or answering an email or making a return telephone call after a message was left.

The Sixth and Fourteenth Amendments and Const. art. I, § 22 guarantee a fair and impartial fact-finder. *State v. Morgensen*, 148 Wn. App. 81, 88, 197 P.3d 715 (2008). A judicial proceeding must manifest an appearance of impartiality, such that a reasonable person would conclude that it was fair neutral. *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674 (1995). Judicial conduct violates this guarantee if the court's biased attitude can reasonably be inferred from the record. *State v. Elmore*, 139 Wn.2d 250, 276, 985 P.2d 289 (1999). Evidence of either actual or potential bias violates this "appearance of fairness" doctrine and requires reversal. *State v. Post*, 118 Wn.2d 596, 618-19, 826 P.2d 172 (1992). It also requires that the judge appear to be impartial. *State v. Madry*, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972). Even without proof of actual bias, if the record creates the appearance of bias or

prejudice, that perception can damage public confidence in our system of justice much as actual bias or prejudice. Id

Here, the JA should have answered the phone and email messages¹³ rather than continue using snail mail. There was obviously a problem with regular mail and the trial court showed obvious bias towards Tumwater by not correcting the problem by using electronic communications mandated by the Governor ¹⁴and Supreme Court during the covid era.

IV. CONCLUSION

Wherefore, based on the aforementioned arguments, Kanam respectfully requests reversal and remand to the trial court, with orders to abide by the permit and historic building process outlined in CP 68 and CP 70.

¹³ CP 290 APPENDIX 4

¹⁴ <https://www.governor.wa.gov/sites/default/files/proclamations/20-45%20COVID19%20Protection%20Orders%20and%20Personal%20Service%20.pdf>

SUBMITTED, this 16th day of August 2021.

By:



Kurt Kanam
2103 Harrison # 143
Olympia WA. 98502

FILED
COURT OF APPEALS
DIVISION II
2021 AUG 16 PM 1:16
STATE OF WASHINGTON
BY AP
DEPUTY

Certificate of Service

I hereby certify that I will email the following documents.

1. OPENING BRIEF

To the following:

Karen Kirkpatrick
555 Israel Rd SW,
Tumwater, 98501

Michael Throgmorton
P.O. Box 11880
Olympia, WA 98508-188

Executed this 16th day of August 2021.

By:



**Kurt Kanam
2103 Harrison # 143
Olympia WA. 98502**

NO. 55861-1-II

WASHINGTON STATE COURT OF APPEALS DIVISION II

KURT KANAM,

Petitioner,

v.

CITY OF TUMWATER ET AL,

Respondents.

APPENDIX

Kurt Kanam
2103 Harrison # 143
Olympia WA. 98502

ORIGINAL

APPENDIX
TABLE OF CONTENTS

	PAGE
Appendix 1	
Letter to AG requesting action and AG response.....	1-3
Appendix 2	
Trial Court order.....	4-6
Appendix 3	
Tumwater Thurston County Joint Comprehensive plan.....	7-14
Appendix 4	
Email to JA Doug Bales.....	15-16

APPENDIX 1

Kurt Kanam
2103 Harrison #143
Olympia WA 98502

Jeff Even
Wa State Attorney General office
1125 Washington St SE, Olympia, WA 98501

September 1, 2020

Re Request for action

Dear Mr Even,

I am writing to inform you of an unconstitutional expenditure of public funds. The City of Tumwater has enacted Municipal Code 18.54.070 that does not comply with RCW 35a.02.040, RCW 43.21 and RCW 42.56.040.

I am requesting that your office take action to prevent any expenditure of public funds to enforce or defend Tumwater Municipal Code 18.54.070.

Thanks

Kurt Kanam



Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON

Administration Division
PO Box 40100 • Olympia, WA 98504-0100 • (360) 753-6200

September 4, 2020

Kurt Kanum
2103 Harrison Ave. # 143
Olympia, WA 98502

Re: Claim regarding Tumwater Municipal Code 18.54.070

Dear Mr. Kanum:

I write in response to your letter dated September 1, 2020. You request that our office bring an action to prevent any expenditure of public funds to enforce or defend Tumwater Municipal Code 18.54.070.

We consider litigation at the request of taxpayers in appropriate situations. Based upon review of your letter, we cannot conclude that the action you request would clearly serve the interests of the public in their capacity as taxpayers. We therefore decline to take the actions you request, but do so without expressing any view as to whether your claims may have potential merit.

To the extent your request is made as a prerequisite to asserting taxpayer standing, please understand that this letter expresses no view as to whether the requirements for taxpayer standing would be met.

I trust that this information will be helpful.

Sincerely,

s/Jeffrey T. Even
JEFFREY T. EVEN
Deputy Solicitor General

APPENDIX 2



SUPERIOR COURT
THURSTON COUNTY, WASH.

2021 APR 22 AM 8:36

Linda Myhra Enlow
Thurston County Clerk

☐ EXPEDITE
☒ Hearing is set:
Date: April 9, 2021
Time: 9:00 a.m.
Judge/Calendar: Judge Lanese/Dispositive Civil

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

KURT KANAM,

Plaintiff,

vs.

PETER KMET, CITY OF TUMWATER.

Defendants.

NO. 20-2-02405-34

ORDER GRANTING
DEFENDANTS' MOTION TO DISMISS

EX PARTE

This matter came before the Court on Defendants City of Tumwater's and Mayor Pete Kmet's Motion to Dismiss Plaintiff Kurt Kanam's compliant under Civil Rule 12(b). The Court has reviewed the following:

1. Defendants' Motion to Dismiss
2. Plaintiff's response, if any, and
3. Defendant's reply to Plaintiff's response, if any.

Having reviewed the foregoing, as well as the documents and records in the court's file with regard to the case herein, the Court considers itself fully advised.

Review of the plaintiff's complaint reveals that Mr. Kanam alleges standing to challenge the City of Tumwater ordinances at issue based solely upon the City of Tumwater's refusal to permit a particular

[PROPOSED] ORDER GRANTING
DEFENDANTS' MOTION TO DISMISS - 1
Cause No.: 20-2-02405-34

LAW, LYMAN, DANIEL,
KAMERRER & BOGDANOVICH, P.S.
ATTORNEYS AT LAW
2574 E. W. JOHNSON RD TUMWATER WA 98512
P.O. BOX 1196 OLYMPIA WASHINGTON 98513

1 use of a building that Mr. Kanam is interested in purchasing in the City of Tumwater. Mr. Kanam does
2 not allege any current ownership interest in the building, nor does allege that he resides in, or pays taxes
3 to, the City of Tumwater. The Court finds :
4 *to request judicial review in this case Kanam must first request action by*
5 *the attorney general and that request must be refused. Greater Harbor 2000*
6 *v. City of Seattle, 132 Wash2d 267, 937 P.2d 1082 (1997) AND while no*
7 *showing of injury to the alleged taxpayer serves as an absolute bar,*
8 *the law still requires a request to the attorney general first.*
9 *Kightlinger v. PUD, 119 Wash App 501, 81 P.3d 876 (2003)*

10 THE COURT ORDERS:


11 The Defendant's motion to Dismiss is GRANTED.

12 Dated 4/21/21

13 Presented by:

14 LAW, LYMAN, DANIEL, KAMERRER
15 & BOGDANOVICH, P.S.


SHARON D. AMAMILO

16 
17 Michael J. Throgmorton, WSBA #44263
18 Attorney for City of Tumwater and Mayor Kmet
19
20
21
22
23
24
25
26

APPENDIX 3

**CITY OF TUMWATER AND
THURSTON COUNTY
JOINT PLAN UPDATE
(CITY RESOLUTION NO. R2021-004/
COUNTY ORDINANCE NO. TO BE ASSIGNED)
STAFF REPORT
JOINT CITY AND COUNTY
PLANNING COMMISSION BRIEFING**

Issue

The Tumwater and Thurston County Joint Plan was adopted in 1995 with minor amendments in 2009. This is the first substantial update of the Joint Plan since its adoption in 1995.

Suggested Focus for this Briefing

While the Planning Commissioners are encouraged to review all the materials in the meeting packet, in preparing for this briefing, staff suggests that the Planning Commissioners read the staff report and focus on the following areas of the Joint Plan:

1) Introduction to the draft Joint Plan.

In the draft Joint Plan, read Sections 1.1 *Background* and 1.2 *Purpose of Joint Planning* (pages 1 – 2 in the version of the Plan with the edits turned off).

2) Description of the Joint Plan.

In the draft Joint Plan, read Chapter 2 *Description of Joint Plan Area* (pages 5 – 8 in the version of the Plan with the edits turned off).

3) Land Use Demand and Capacity.

In the draft Joint Plan, read Section 3.3 *Land Supply Analysis* (pages 31 – 43 in the version of the Plan with the edits turned off) and in the staff report, read Item 1 in *Suggested Areas for Discussion*. Staff intends to review and discuss the land supply analysis with the Planning Commissions in more detail at the briefing.

4) Land Use Goals and Policies.

In the draft Joint Plan, read Section 3.2 *Goals and Policies* (pages 19 – 31 in the version of the Plan with the edits turned off) or in Appendix 1 of the staff

March 23, 2021

Summary

The Tumwater and Thurston County Joint Plan is a comprehensive plan for the unincorporated portion of the City of Tumwater urban growth area prepared jointly by the City and the County. The Joint Plan is a component of both the City and County's Comprehensive Plans.

City of Tumwater and Thurston County Joint Plan
City Resolution No. R2021-004/County Ordinance No. TBD
Page 2

248

GOAL #1

Ensure that the Joint Plan Land Use Element is implementable and coordinated with all applicable City of Tumwater and Thurston County plans and regulations and the plans of other jurisdictions in the Thurston region.

Policies

- 1.1 Ensure that the consistency of the Joint Plan Land Use Element with adopted County-Wide Planning Policies and the integration of transportation considerations into land use decisions, and vice versa.
- 1.2 Integrate the goals of the Sustainable Thurston Plan into the Joint Plan Land Use Element.
- 1.3 Seek active public involvement during updates of the Joint Plan.
- 1.4 Ensure consistency between the Joint Plan Land Use Element and all other elements of the City of Tumwater and Thurston County Comprehensive Plans and the Port of Olympia *Comprehensive Scheme of Harbor Improvements*.
- 1.5 Coordinate the Joint Plan Land Use Element with the Port of Olympia *Regional Airport Master Plan* and the Port of Olympia *Strategic Plan*.
- 1.6 Ensure that development in the Joint Plan area is consistent with the Thurston County Shoreline Master Program.

City of Tumwater and Thurston County Joint Plan
City Resolution No. R2021-004/County Ordinance No. TBD
Page 16

262

- 2.7 Ensure the processing of applications for development permits in a timely and fair manner, and coordinate processing between the City of Tumwater and Thurston County to enhance predictability.

City of Tumwater and Thurston County Joint Plan
City Resolution No. R2021-004/County Ordinance No. TBD
Page 17

263

TUMWATER / THURSTON COUNTY JOINT PLAN



**An Element of the Tumwater Comprehensive Plan
And Thurston County Comprehensive Plan**

**Adopted April, 1995
2009 Update**

045

**TUMWATER/THURSTON COUNTY
JOINT PLAN**

**CHAPTER 3
LAND USE**

065

and industry in the Tumwater area (Section 3.5, Proposed Land Use Designations). The Tumwater Economic Development Plan, an element of the City of Tumwater Comprehensive Plan, also makes specific recommendations for economic development in Tumwater.

6. *Property rights. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.*

This chapter was developed with sensitivity to property rights issues. Designation of areas for future land uses were based upon many factors including the impact of designations on private property.

7. *Permits. Application for both State and local government permits should be processed in a timely and fair manner to ensure predictability.*

The Joint Plan includes a policy to ensure timely and fair processing of development permits (Goal #2, Policy 2.6). However, Chapter 10 of this document outlines the implementation of Joint Plan recommendations. Implementation actions will be accomplished as follow on development regulations by both the City of Tumwater and Thurston County, as appropriate. The Tumwater Housing Plan (see Chapter 6) contains an assessment of barriers to affordable housing and includes an analysis of average development permit processing times in the City of Tumwater. Tumwater is currently achieving quick turnaround times for permits, and can typically process permits quickly enough to not be a factor in housing affordability.

8. *Natural resource industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.*

This chapter ensures the viability of natural resource industries through the identification of such lands in the text and land use maps. Additionally, the Tumwater and Thurston County comprehensive plans contain specific guidelines and policies regarding critical areas and resource lands that ensure the viability of natural resource industries and activities.

9. *Open space and recreation. Encourage the retention of open space and development of recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop*

development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

The land use element of the Joint Plan has been closely coordinated with the development of Chapter 8, Transportation and Chapter 9, Public Facilities and Services. The Joint Plan will ensure concurrency through coordination of the Tumwater and Thurston County Capital Facilities Plans, as outlined in Chapters 9 and 10 of this document. This chapter contains goals and policies that ensure this coordination. (Goal #1, Policy 1.1; Goal #2, Policies 2.1 through 2.4; Goal #3, Policies 3.1 through 3.9; Goal #5, Policy 5.1; Goal #6, Policies 6.1 & 6.2; Goal #7, Policy 7.1)

13. *Historic preservation. Identify and encourage the preservation of lands, sites, and structures that have historical or archaeological significance.*

The City of Tumwater and Thurston County have historic preservation programs which provide processes for designation of local historic sites for protection. Similar programs are conducted at the State and national levels. The Joint Plan land use element contains goals and policies encouraging consistency with and support for these programs. (Goal #12, Policies 12.1 & 12.2)

3.1.2 County-Wide Planning Policy Compliance

The Growth Management Act requires that comprehensive plans be consistent with adopted County-Wide Policies. The adopted County-Wide Planning Policies are included in this document in their entirety in Appendix C. The following is a brief description of how the Joint Plan land use element is consistent with the adopted County-Wide Policies for Thurston County:

I. Urban Growth Areas

Chapter 2 of this document establishes growth boundaries in accordance with these policies. This chapter has been developed consistent with Chapter 2.

II. Promotion of Contiguous & Orderly Development & Provision of Urban Services

This chapter contains goals, policies and objectives that encourage compact, efficient urban development and encourages urban growth to be phased outward from the urban core. It also proposes residential and mixed use land use designations that will

APPENDIX 4

hearing schedule

kurt kanam <kurtkanam@gmail.com>

Wed 4/7/2021 4:43 PM

To: doug.bales@co.thurston.wa.us <doug.bales@co.thurston.wa.us>; john worthington <worthingtonjw2u@hotmail.com>

Hi Doug I have a hearing set for this friday but I haven't got a schedule with a phone number and passcode

my case is Kanam V Peter Kmwt No 20-2-02405-34

could you please send me a copy of the schedule

thanks Kurt